

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott  
Marshall Johnson  
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Chair  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Complaint of Eschelon  
Telecom of Minnesota, Inc. Against Qwest  
Corporation Regarding the Pricing of  
Unbundled Dedicated Interoffice Transport

ISSUE DATE: November 5, 2002

DOCKET NO. P-421/C-02-550

ORDER RESOLVING COMPLAINT

**PROCEDURAL HISTORY**

On April 15, 2002, Eschelon Telecom of Minnesota, Inc. (Eschelon) filed a complaint pursuant to Minnesota Statutes § 237.462 alleging that Qwest Corporation (Qwest) was over-charging for high-capacity connections between wire centers, called “unbundled dedicated interoffice transport” (UDIT).<sup>1</sup>

On April 30, 2002, Qwest filed an answer.

On June 3, 2002, the Commission issued its ORDER ESTABLISHING SCHEDULE FOR EXPEDITED CONSIDERATION OF COMPLAINT, finding jurisdiction and deciding that the matter could be resolved as a matter of law without evidentiary proceedings.

On June 10, 2002, Eschelon filed its brief.

On July 1, 2002, Qwest filed a reply.

On July 10, 2002, Eschelon filed a response.

On July 12, 2002, the Minnesota Department of Commerce (the Department) filed comments.

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<sup>1</sup> “*Interoffice transport*” provides a means for sending information – voice or data or both – between two central offices of a telephone company. “*Dedicated interoffice transport*” is used by one party, not shared as part of the switched public network. “*Unbundled dedicated interoffice transport*” is offered for sale by itself, without being combined with other network elements. Newton’s Telecom Dictionary, 17<sup>th</sup> ed.

On July 19, 2002, Qwest filed a response to the Department's comments.

The matter came before the Commission on August 29, 2002.

## **FINDINGS AND CONCLUSIONS**

### **I. Background**

The Telecommunications Act of 1996<sup>2</sup> (the Act) was designed to open all telecommunications markets to competition, including the local exchange market. (Conference Report accompanying S. 652). The Act opens markets by requiring each incumbent local exchange carrier (ILEC) to –

- permit CLECs to purchase services at wholesale prices and resell them to customers;
- permit CLECs to interconnect with its network on competitive terms; and
- offer unbundled network elements (UNEs) – that is, offer to rent elements of its network to CLECs without requiring the CLEC to also rent unwanted elements – on just, reasonable, and nondiscriminatory terms.<sup>3</sup>

A CLEC desiring to provide local exchange service can negotiate an interconnection agreement (ICA) with an ILEC to set the terms for interconnecting with the ILEC's network, buying services for resale, and buying the use of the ILEC's UNEs. 47 U.S.C. §§ 251(c), 252(a). A CLEC may insist on the same terms that an ILEC offers to another CLEC for any interconnection, service, or network element. § 252(i). In addition, the ILEC and the CLEC may adopt any terms that are not discriminatory or contrary to the public interest. § 252(e)(2)(A). If the ILEC and the CLEC cannot reach agreement, either party may ask the State commission to arbitrate unresolved issues and to order terms consistent with the Act. § 252(b).

On December 2, 1996, the Commission set interim rates for arbitrated terms in ICAs involving US West Communications, Inc. (US West), the predecessor to Qwest.<sup>4</sup> These rates would remain

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<sup>2</sup> Pub.L.No. 104-104, 110 Stat. 56, codified in various sections of Title 47, United States Code.

<sup>3</sup> 47 U.S.C. § 251(c).

<sup>4</sup> *Consolidated Arbitration Case*, Docket Nos. P-442, 421/M-96-855, P-5321, 421/M-96-909, and P-3167, 421/M-96-729, ORDER RESOLVING ARBITRATION ISSUES AND INITIATING A US WEST COST PROCEEDING.

in effect until permanent rates could be established in the *Generic Cost Case*.<sup>5</sup> The Commission ordered that parties could bill each other retroactively (“true up” their accounts) for the difference between the interim rates and the permanent rates for the elements and services they provided.

On October 4, 1999, the Commission approved an ICA, and first amendment to that agreement, negotiated between US West and Cady Telemanagement, Inc. (Cady), predecessor to Eschelon, largely based on another ICA adopted in Minnesota.<sup>6</sup> The agreement consists of a main contract document labeled “Part A,” containing numbered paragraphs; several attachments; and two price schedules. Schedule 2, listing UNE prices then under arbitration, stated that “Rates are interim and subject to true-up based on further Commission proceedings.” The agreement did not establish terms for providing UDIT. The agreement would last until the parties negotiated or arbitrated a new agreement, or until March 17, 2002, whichever occurred later. ICA Part A ¶ 1.2.

On January 24, 2000, US West and Cady completed negotiating a second amendment to their ICA establishing the price for collocation.<sup>7</sup> That amendment states in part as follows:

21.1. [F]inal decision of the MPUC [the Commission] in cost docket [*sic*] or other proceedings will govern the final determination of all cost issues, including the “true-up” of all costs already billed and collected.

\* \* \*

Neither the Agreement nor this Amendment may be further amended or altered except by written instrument executed by an authorized representative of both parties.

The proposed amendment was subsequently filed with the Commission and approved.

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<sup>5</sup> *In the Matter of a Generic Investigation of US West Communications, Inc.’s Cost of Providing Interconnection and Unbundled Network Elements*, Docket No. P-442, 5321, 3167, 466, 421/CI-96-1540 (*Generic Cost Case*).

<sup>6</sup> *In the Matter of a Request for Approval of the Interconnection Agreement and Amendment One to the Agreement Between US WEST Communications, Inc. and Cady Telemanagement, Inc.*, Docket No. P-5340, 421/M-99-1223.

<sup>7</sup> Second Amendment To Agreement For Local Wireline Network Interconnection And Service Resale Between Cady Telemanagement, Inc. And U S West Communications, Inc. Minnesota (UDIT amendment), *In the Matter of a Request by US WEST Communications, Inc. and Cady Telemanagement, Inc. for Approval of Amendment Two to the Companies’ Interconnection Agreement*, Docket No. P-5340, 421/M-00-107.

On April 5, 2000, US West and Cady completed negotiating a third and fourth amendment to their ICA. One amendment established the terms for providing UDIT.<sup>8</sup> The UDIT amendment was drafted by US West, based on a US West cost study, and states in part as follows:

1. DESCRIPTION OF AMENDMENT AND MODIFICATIONS

Added, as a new Section 37.14 to Section 37., “Unbundled Network Elements,” of the Agreement, “Unbundled Dedicated Interoffice Transport,” as follows....

\* \* \*

3. FURTHER AMENDMENTS

....Neither the Agreement nor this Amendment may be further amended or altered except by written instrument executed by an authorized representative of both parties.

Unlike the second amendment, this filing did not specify whether the amendment’s terms were permanent or interim subject to true-up. The proposed amendment was subsequently filed with the Commission and approved.

On June 22, 2000, the Department filed the list of permanent interconnection rates in the *Generic Cost Case*, including prices for high-capacity digital service (DS) lines such as DS1s and DS3s.<sup>9</sup> This filing concluded the case arbitrating permanent interconnection rates, and triggered the opportunity for parties to seek true-up payments from each other.

In March, 2001, Qwest began billing Eschelon (successor to Cady), for UDIT at rates higher than those established in the UDIT amendment. Also, beginning in October, 2001, Eschelon began asking Qwest for enhanced extended loops (EELs).<sup>10</sup> Qwest declined to provide EELs priced on the basis of the UDIT amendment, and instead charged Eschelon on the basis of the price of DS1 and DS3 lines.

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<sup>8</sup> Third Amendment To Agreement For Local Wireline Network Interconnection And Service Resale Between Cady Telemanagement, Inc. And U S West Communications, Inc. Minnesota (UDIT amendment), *In the Matter of a Request by US WEST Communications, Inc. and Cady Telemanagement, Inc. for Approval of the Third and Fourth Amendments to the Interconnection Agreement*, Docket No. P-5340, 421/M-00-433.

<sup>9</sup> A DS0 line is a standard telephone circuit, such as the line that connects to a standard telephone handset, and transmits 64,000 bits of information per second. A DS1 line transmits the equivalent of 24 circuits, or 1.544 megabits per second (mbps). A DS3 line can transmit the equivalent of 672 circuits, or 44.736 mbps. Newton’s Telecom Dictionary, 17<sup>th</sup> ed.

<sup>10</sup> Eschelon describes an EEL as UDIT combined with a line connecting a customer’s premises to Qwest’s central office; it may also include multiplexing or concentration capabilities.

In October, 2001, Eschelon disputed these charges. Qwest responded in January, 2002, arguing that the permanent UNE prices for DS1 and DS3 supercede the UDIT prices established in the UDIT amendment. After further discussions failed to resolve the disagreement, Eschelon's complaint followed.

On April 4, 2002, in a separate docket, the Commission declared that –

Effective on the date of this Order, all Qwest rates currently under review in the following dockets are declared interim and subject to true-up once final rates are established in these dockets: Docket No. P-421/CI-01-1375 (the UNE Pricing Docket) and Docket No. P-442, 421, 302/M-01-1916 (the AT&T Complaint Docket).<sup>11</sup>

## **II. Party Positions**

### **A. Eschelon Complaint and Argument**

Eschelon complains that Qwest –

- is charging an amount for UDIT, both by itself and as part of EELs, that is not consistent with the amount negotiated in its Commission-approved ICA, and
- withheld EELs service based on the UDIT amendment price, compelling Eschelon to sign a separate EELs amendment, based on a higher price, as a condition of service.

Eschelon asks the Commission to do the following, among other things:

- find that Qwest's actions constitute repeated and continuing violations of the ICA, Minn. Stat. §§ 237.06, 237.121(a)(2) and 237.121(a)(4) and the Act, including 47 U.S.C. 251(c)(3),
- order Qwest to bill Eschelon for UDIT, including the UDIT element of EELs, consistent with the terms of the UDIT amendment,
- order Qwest to immediately refund to Eschelon all overcharges for UDIT and EELs, and
- assess administrative penalties against Qwest.

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<sup>11</sup> *In the Matter of the Commission Review and Investigation of Qwest's Unbundled Network Elements UNE Prices*, Docket No. P-421/CI-01-1375 ORDER ESTABLISHING INTERIM RATES. The *UNE Pricing Docket* was opened to establish the arbitrated terms for elements that were not addressed in the *Generic Cost Case*. The *AT&T Complaint Docket* was opened to establish new arbitrated prices for elements used in a common package known as the UNE Platform.

## **B. Qwest's Response and Counter-Claim**

Qwest argues that the Commission's orders setting interim prices for UNEs supercede the rate negotiated in the UDIT amendment. The ICA states explicitly that "Rates are interim and subject to true-up based on further Commission proceedings." Standard rules for contract construction support applying this language to the UDIT amendment. The Commission has twice declared UNE rates interim subject to true-up: once in its December 6, 1996 Order, and again in its April 4, 2002 Order.

If the Commission were to rule otherwise, then Qwest would provide UDIT to Eschelon at a lower price than it provides UDIT to any other CLEC, distorting the telecommunications market by placing those CLECs at a competitive disadvantage.

In sum, Qwest asks the Commission to dismiss Eschelon's complaint. Further, Qwest rejects the need for, and the propriety of, assessing administrative penalties. To the contrary, Qwest asks the Commission to direct Eschelon to pay the back charges withheld for the UDIT service Qwest has already provided, plus interest.

## **C. Eschelon Rebuttal**

Eschelon denies that the ICA makes all rates interim subject to true-up. The ICA's only reference to interim rates appears at the beginning of Schedule 2, and by implication refers exclusively to the rates in that schedule. The UDIT amendment amends the ICA's main document, not Schedule 2, and therefore is not governed by that schedule's proviso. If the parties had intended to make the UDIT terms interim subject to true up, they would have done so explicitly as they did with their second ICA amendment.

Moreover, Eschelon argues that the *Generic Cost Case* did not establish a price for UDIT, so any effort to true-up the UDIT price to a price in that docket is pointless.

## **D. Department Position**

The Department supports Eschelon's complaint. The UDIT amendment language and the circumstances of its adoption indicate that the parties did not intend the Amendment price to be interim subject to true-up. Additionally, the Department shares Eschelon's view that the *Generic Cost Case* did not establish a price for UDIT.

## **III. Commission Analysis and Action**

As the conflicting positions of the parties suggests, the language of the UDIT amendment is subject to varied interpretation. As discussed at the hearing, that language -- including the price terms in dispute -- was drafted by Qwest. Standard principles of contract law provide that ambiguous terms will be construed against the drafter. *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 148 (Minn. 2002).

Here Eschelon asserts that it understood the UDIT amendment to be a permanent price negotiated and approved pursuant to the Act's § 252. This assertion is reasonable and consistent with the record. While the ICA's Schedule 2 states that price terms are subject to true-up, Eschelon argues that the price terms of Schedule 2 are not at issue. The UDIT amendment is explicit about which parts of the ICA it amends; it does not amend Schedule 2 and so, according to Eschelon, Schedule 2's true-up proviso does not apply to the UDIT amendment. If the parties had intended to make the terms interim, Eschelon argues, they would have done so explicitly as they did in their second ICA amendment. Again, these assertions are reasonable and consistent with the record.

While Qwest asserts that the UDIT amendment will provide Eschelon with a competitive advantage over other CLECs, this allegation remains unproven. The Act's § 252(i) states:

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

Potentially other CLECs will seek to adopt the UDIT amendment as well.

Further, since the expiration date for the Eschelon/Qwest ICA has passed, the agreement remains in effect only by the consent of the parties. At any time Qwest may seek to renegotiate with Eschelon or, failing that, ask the Commission to arbitrate new terms. ICA Part A ¶ 1.2. Until this occurs, however, the relationship between Qwest and Eschelon will continue to be governed by that agreement, including the UDIT amendment.

Eschelon brought its complaint pursuant to Minnesota Statutes § 237.462, which provides for administrative penalties. Before assessing penalties, the Commission must consider a number of factors, including "the willfulness or intent of the violation." § 237.462, subp. 2(b)(1). Given the degree of ambiguity in the language, the Commission cannot conclude that Qwest's interpretation was made in bad faith. Consequently, the Commission will decline to impose penalties in this matter.

In sum, the Commission finds that Qwest must provide UDIT to Eschelon on the basis of the terms contained in the UDIT amendment, and that neither of the Commission's orders declaring UNE rates to be interim subject to true-up are applicable here.

The Commission will so order.

### **ORDER**

1. The Commission finds that the terms of the UDIT amendment to the Eschelon/Qwest ICA are not interim subject to true-up.

2. No administrative penalties are warranted in this matter.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)

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